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From: Kevin Mohr [mailto:kemohr@comcast.net]
Sent: Saturday, May 29, 2004 7:03 PM
To: Ethics: Rules Revision Commision
Cc: Kevin Mohr; Kevin Mohr; Kevin Mohr; McCurdy, Lauren
Subject: [rrc] RRC - Rule 1-400 - Rule Draft 2 (05/28/2004)

Greetings:

I've attached a new version of the advertising and solicitation rules based on a Model Rule template. There is a clean version, in WP and PDF. Because of the limitation on message size for this listserv, however, I have to forward you the redline version, comparing Draft 2 to Draft 1, by separate e-mail. This is the draft reference in Item III.A. of the 7/9/04 Assignment Agenda for your review.

Some points:

1. No Discussion. As with the last draft, I have not included any comments to the rules. The Discussion section has been put off until we have the rules in order.

2. New Endnotes & E-mail Comments. I have added some endnotes to capture other issues that arose either at the 5/7/04 meeting, or which were raised in e-mails that were circulated before that last meeting. Consequently, the endnote numbering from the last time is off from draft 1. However, so you don't have to look through the previous e-mails and figure out which comments referred to which endnotes, I have pasted most of the previous comments into the endnotes. I hope that makes it a bit easier for you to review the material.

a. I've also attached a copy of the e-mails from before the last meeting, in both Word and PDF.

3. Identified Issues. In most endnotes, I've tried to address the precise issues as I've identified them. That does not mean that there are not other issues that warrant the Commission's attention. The e-mails circulated prior to the last meeting raised a number of issues not identified in the previous draft.

4. Tonnage. There's a lot of verbiage (i.e., tonnage) in the endnotes. I've tried to capture what has occurred at the previous meetings so that when it comes time to put together the rules for posting to the web, our job will be a little easier. That's one reason why I've tried to identify specific issues for discussion at the 7/9/04 meeting. If you're pressed for time, you might consider focusing on the identified issues.

5. "Material". In note 11, I address rule 7.2(b)(2) and (4), and discuss "materiality" again. I realize that the Commission voted not to include the "material" limitation on untrue statements, etc., at the 5/7/04 meeting. See note 10. I have now researched the rule in all the states and with the exception of three, all of them use the "material" limitation for their provisions that are analogous (or identical) to proposed paragraphs (b)(2) and (b)(4). I am not trying to reopen the

issue. I would recommend, however, that we flag the issue and solicit public comment on it when we post the rules to the web.

6. New Endnotes Identified. Please note that not all of the new endnotes appear highlighted in the redline version. Unfortunately, WordPerfect does not identify entirely new endnotes; it only identifies those pre-existing endnotes that have been modified.

a. Here are the numbers of the entirely new, "stealth" endnotes: 11, 14-21, 23, 25-26, 29, 33, 34.

7. Request that you number your comments. Please, if you send an e-mail commenting on the attached, number your comments. Also, in addition to referencing the specific rule section, if you are commenting on something in an endnote, please refer to the specific endnote number. If you respond to someone else's e-mail, please respond to the specific comment you are addressing by its number. Again, this is immensely helpful to the drafters (and Randy and me) in putting together the web posting later on. Sometimes, we have to track down statements, considerations, etc., and referencing the other person's e-mail by date and comment number really does help us out.

8. Finally, I have not run this by the rule co-drafters. Any mistakes, errors, misjudgments, etc. are entirely my own.

Thanks,

Kevin

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Kevin E. Mohr
Professor
Western State University College of Law
1111 N. State College Blvd.
Fullerton, CA 92831
714-459-1147
714-738-1000 x1147
714-525-2786 (FAX)
kevin_e_mohr@compuserve.com
kevinm@wsulaw.edu

You are currently subscribed to rrc as: lauren.mccurdy@calbar.ca.gov.
To unsubscribe send a blank email to leave-rrc-3356D@calbar.org

CalBar – RRC
Rule 1-400
Communication, Advertising & Solicitation
Model Rule Template – Draft 2
For Discussion at July 9, 2004 Meeting
May 28, 2004

RULE 7.0. DEFINITIONS[1]

ENDNOTES THAT WERE DELETED OR WHICH STILL NEED TO BE ADDRESSED:

Endnote [2] – Deleted

Endnote [3] – Deleted

Endnote [4] – Use of "live" to modify "telephone". *See* rule 7.3.

Endnote [5] – Use of "real-time electronic contact" in rule 7.3 re solicitation.

Endnote [6] – Term "electronic medium," which is used in B&P Code § 6157.

RULE 7.1. COMMUNICATIONS CONCERNING A MEMBER'S[7] SERVICES

(a) A member shall not make a false or misleading communication as defined herein ~~about the member or the member's services~~.[8]

(b) A communication is false or misleading if it:[9]

(1) Contains any[10] untrue statement; or

(2) Contains any misrepresentation of fact or law;[11] or

(3) Contains any matter, or presents or arranges any matter in a manner or format which is false, deceptive, or which confuses, deceives, or misleads the public; or

(4) Omits to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public.

(c) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.[12]

(d) A member shall retain for two years [one year] a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.[13]

(e)[14] For purposes of this ~~rule~~ **chapter**,[15] "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a **member's**[16] law firm ~~directed to any former, present, or prospective client~~,[17] including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name, **domain name**,[18] or other professional designation of such member or law firm; or

(2) Any stationery, letterhead, business card, sign, brochure, **Internet web page or web site, e-mail, or other written document sent or posted by electronic transmission,** or other comparable written material[19] describing such member, law firm, or lawyers; or

(3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof;[20] or

(4) Any unsolicited correspondence from a member or law firm directed to any person or entity.[21]

Comment[22]

RULE 7.2. ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a member may advertise services through written, recorded or electronic communication, including public media.

(b) A member shall not give anything of value to a person for recommending the member's services except that a member may[23]

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;[24]

(2) pay the usual charges of a legal services[25] plan or a qualified[26] lawyer referral service.[27] A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California;[28]

(3) pay for a law practice in accordance with rule 2-300; and

(4) refer clients to another member or a nonmember professional[29] pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the member, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.[30]

(c) Any communication made pursuant to this rule shall include the name and office address of at least one member or law firm responsible for its content.[31]

RULE 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS[32]

(a) A member shall not by in person or, live[33] telephone or real-time electronic contact[34] solicit professional employment from a prospective client when a significant motive for the member's doing so is the member's pecuniary gain, unless [**the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California or**][35] the person contacted:

(1) is a lawyer;[36] or

(2) has a family, **close personal**,[37] or prior professional relationship with the member.

(b) A member shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or **real-time electronic contact**[38] even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the member a desire not to be solicited by the member; or

(2) the solicitation is transmitted in any manner which involves **intrusion**, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.[39]

(c) Every written or, recorded or electronic communication from a member soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.[40]

(d) Notwithstanding the prohibitions in paragraph (a), a member may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the member that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.[41]

RULE 7.4. COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION[42]

(a) A member may communicate the fact that the member does or does not practice in particular fields of law.[43]

(b) A member admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;[44]

(c) A member engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A member shall not state or imply that a member is certified as a specialist in a particular field of law, unless:

(1) the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors; and

(2) the name of the certifying organization is clearly identified in the communication.[45]

RULE 7.5. FIRM NAMES AND LETTERHEADS

(a) A member shall not use a firm name, letterhead or other professional designation that violates Rule 7.1.[46] A trade name may be used by a member in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.[47]

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation[48] in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.[49]

(c) The name of a member holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the member is not actively and regularly practicing with the firm.[50]

(d) A member may state or imply that the member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 only when such relationship in fact exists.[51]

(e) A member may state or imply that the member or member's law firm is "of counsel" to another lawyer or a law firm only if the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172) which is close, personal, continuous, and regular.[52]

RULE 7.6. POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES[53]

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

ENDNOTES

1. **RRC Action**: At the 12/12/03 Meeting, the RRC voted to include a separate definitions section. At the 5/7/2004 Meeting, however, the RRC voted against a separate definitions section. Nevertheless, the drafters were directed to draft a proposed definition of "communication" for inclusion in rule 7.1. *See* rule 7.1(e).

2. [DELETED]

3. [DELETED]

4. ***See Note 33, below.***

5. ***See Note 34, below.***

6. In draft 1 of MR Template rule 1-400 (032504), **B & P Code § 6157(d)** had been changed to anticipate future "electronic media". That issue is now moot, as per vote at 5/7/04 Meeting, rules will not include a definition section. Nevertheless, it was suggested that RRC needed to note in Final Report that the B & P Code would also have to be amended to conform with change. Members also suggested changing "computer network" to "the Internet". In addition, see member comment below.

Member Comments: 5/5/04 Tuft Memo, Rule 7.0, #7: "Rather than recommend in our final report that Business & Professions Code §6157 be amended, the report should recommend that §6157 et seq. be remove from the State Bar Act."

KEM 5/27/04 Response: Agreed. Note made to include in final report if RRC also agrees.

Issue: Should RRC include recommendation in its final report that 6157 et seq. be removed from State Bar Act?

7. **Issue**: I've changed "lawyer" to "member" in the ABA rules. Should we do that? One of the reasons for going with the ABA format is that it promotes uniformity and consistency amongst the states in an area that may require those traits in light of the Internet and MJP. Do we want to limit these rules to "member"? It probably does not matter; if these rules end up like the rules from other states, then the out-of-state lawyer would have violated her home state's rules on advertising.

Member comments: 5/5/04 Tuft Memo, Rule 7.0, #2, favors changing to "lawyer" ("'Member' should be changed to 'lawyer' here and throughout the rules, particularly in view of the recent adoption of California Rules of Court 964 - 967. Continued use of the term 'member' is confusing. For example, use of the term 'member' in relation to 'lawyers' in subdivision (a)(2) and 'attorney' in subdivision (b) will confound the reader.")

RRC Action: No consensus was reached at the 5/8/2004 meeting as to whether the term "lawyer" is more appropriate in this rule, the discussion better left for the rule 1-100 debate (**RRC voted** 6 to 3 (with 2 abstentions) to discuss issue as part of 1-100 debate.)

Issue (On Hold): Should "member" be changed to "lawyer"

8. **KEM Note #1**: I've split MR 7.1's two sentences into two paragraphs. The two thoughts are distinct. Paragraph (a) states what is prohibited. Paragraph (b) defines the prohibited conduct. It struck me as cleaner that way.

Issue: Should Model Rule 7.1 be divided into two paragraphs, (a), which sets out the prohibition on making false or misleading communications, and (b), which defines what a "false and misleading communication" is?

Member Comments: 5/4/05 Sapiro E-mail, #7, favors the proposed format.
5/5/04 Tuft Memo, Rule 7.1, #1, states: "We should stay with the ABA format."

RRC Action: No specific action was taken at the 5/7/2004 Meeting. Discussion centered on revising paragraphs (a) and (b), but no motion was made to merge them to parallel the ABA format.

KEM Research: As promised, I reviewed the rule in every state (and D.C.), including the 17 states for which I currently have Ethics 2000 Reports. Of the 17 states that have either adopted new rules after Ethics 2000 or have issued reports concerning the Ethics 2000 revisions, only four have adopted the Ethics 2000 proposed Model Rule 7.1 (i.e., a single paragraph, with two sentences). Even in the states that still have the ABA Code of Professional Responsibility (Iowa, Nebraska, New York, Ohio and Oregon), New York and Iowa do not have a provision similar to 7.1(a) and (b). The other states (Nebraska, Ohio and Oregon) have provisions substantially similar to pre-2002 MR 7.1, which had an expanded definition of "false and misleading". Of the remaining states that have not issued Ethics 2000 reports, all have an expanded definition of "false and misleading." ***See* note 11** re "material."

KEM Note #2: I've deleted "about the member or the member's services" because that limiting concept is covered in the definition of "communication" I was asked to prepare for this draft. *See* rule 7.1(e), below.

9. **KEM Note**: I've substituted current 1-400(D)(1)-(3) for the second sentence of ABA MR 7.1, which provides: "A communication is false or misleading if it contains a **material** misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

Note also that the concepts found in 1-400(D)(4) and (5) may now be found in rule 7.3(c) and 7.3(b)(2), respectively. ***See notes 39 and 40, below.***

KEM Recommendation: The drafting team's charge was to use the ABA language unless there's a good reason not to use it. I think that 1-400(D)(1)-(3), although not as succinct as the ABA's, adds clarity to what is prohibited and would recommend using that language.

Member comments: See previous endnote. 5/5/04 Tuft Memo, Rule 7.1, #3, expressed concern about (D)(4) and (5) not being included in this rule, but at 5/7/04 Meeting, expressed satisfaction that the concepts are covered in rule 7.3. ***See notes 39 and 40, below.***

RRC Action: See previous endnote.

10. **Question**: Should California include the modifiers "material" and "materially" as does the ABA?
RRC Action: At 5/7/2004 Meeting, RRC voted 8 for, 2 against, to remove the words "material" or "materially" from the previous draft of rule 7.1(b)(1)-(3). Concern was expressed that if kept "material," then the rule would conflict with § 6157 and with federal advertising laws that might apply to lawyers, neither of which contain the "material" limitation. A member also commented that a lawyer should be subject for discipline for any lie. Best to have a strict rule. ***But see next note***.

11. **KEM Note**: At the 5/7/2004 Meeting, a concern was raised at the absence of an express prohibition on "misrepresentations of law." See, e.g., *People v. Morse* (Cal.App. 1993) 25 Cal.Rptr.2d 816. I've added subparagraph (b)(2) to address that concern.

KEM Question: Is misrepresentation of law already covered by (b)(1) ("Contains any untrue statement")?

Issues: (1) Should the rule include new (b)(2) re "misrepresentation of fact or law"?
(2) If yes, should it be modified by "material"?

KEM Research: As promised, I reviewed the rule in every state (and D.C.), including the 17 states for which I currently have Ethics 2000 Reports. Of the states, only Iowa, New York and

Virginia do not use "material" to modify "misrepresentation of fact or law."

In addition, with respect to rule 7.1(b)(4) re omitting facts, etc., every state that continues to use some form of that prohibition uses the word "materially," e.g., Georgia RPC 7.1(a)(1), which provides in part "or omits a fact necessary to make the statement considered as a whole not *materially* misleading ...."

KEM Recommendation: (1) Include (b)(2) "misrepresentation of law or fact," limited by "material".

(2) Reconsider & revise rule 7.1(b)(4) to state: "Omits to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not **materially** misleading to the public."

(3) If do not include "material" in either subparagraph of the rule, perhaps flag the issue and solicit public comment on it when the tentative draft is posted to the web.

12. Paragraph (c) [which is current 1-400(E)] was placed here because it refers generally to "communications".

Issues: (1) Should paragraph (c) about standards be kept?

(2) Is this a concept that is necessary now that the field of lawyer communications is better developed?

Member comments: (1) 5/5/04 Tuft Memo, Rule 7.1, #6, states: "[D]efer discussion on the utility of the standards until the rules and the discussion have been determined."

(2) 5/4/04 Sapiro E-mail, #9, states: "If we are going to have Board of Governors standards in the future, I think the effect of the standards should continue to be stated as part of the rule, not as part of the discussion. Because of the presumption under Evidence Code sections 605 and 606, this provision is substantive law, not merely commentary on a matter of substance."

KEM Response & Recommendation: Originally, I recommended that rules should keep the standards, but in the Discussion, unless the subject matter of the standard is covered by a provision already in the rule. I also raised a question about the effect placing the standards in the discussion may have on the standards' presumptive effect. I agree with Mark to defer discussion of the standards until the rules are drafted. As to Jerry's concern re the substantive effect of the standards' presumptions, it is possible that if standards are retained, they do belong in the rules.

13. Paragraph (d) [now 1-400(F)] has been placed here because it refers generally to "communications" and not "advertisements" or "solicitations".

Issues: Should this requirement be (1) kept in the rule or (2) limited to one year? On the one hand, B & P § 6159.1 requires retention of advertisements for only one year. On the other hand, the ABA has removed the record requirement for advertisements altogether. The Reporter's Explanation of Changes for MR 7.2 states:

> "The requirement that a lawyer retain copies of all advertisements for two years has become increasingly burdensome, and such records are seldom used for disciplinary purposes. Thus the Commission, with the concurrence of the ABA Commission on Responsibility in Client Development, is recommending elimination of the requirement that records of advertising be retained for two years."

Member Comments: (1) 5/5/04 Tuft Memo, Rule 7.1, #7, states: "We should delete the recordkeeping requirement under Rule 7.0(d) for the reasons that Ethics 2000 recommended in its revisions to the rules."

(2) 05/04/04 Sapiro E-mail, #10, states: "In Rule 7.1(d), whether we should have the retention requirement for two years or one year I think should be left to the Office of Trial Counsel. They are the ones who will bear the consequence of a shorter retention requirement. In that paragraph, however, I would delete the phrase "true and correct." The two words in that phrase are redundant. Do

we really mean "accurate?" I would also delete the phrase ". . . made by written or electronic media." I do not perceive that any communications in 7.0(a) are neither written nor electronic. The phrase is, to me, surplusage. I also question the meaning of the phrase "factual or objective claim." If we mean that the advertiser must give the State Bar evidence to support any statement of fact, why not say so? . . ."

KEM 5/27/04 Response: (1) I agree with Mark, but there's still § 6159. Perhaps draft rule without retention requirement and recommend the repeal of 6159 in the Rules Filing with the Supreme Court. As Jerry noted, input from OCTC is probably warranted here. (2) If keep retention requirement, then I would keep the ABA language. I agree with Jerry that communications as defined will be either written or electronic, but I think the phrase "written or electronic communications" is used to remind lawyers that they are responsible for keeping copies of digital media, something of which lawyers may not be aware.

14. **KEM Note**: At the 5/7/04 Meeting, I was asked to include a definition of "communication" in this rule. I started with the definition as currently found at rule 1-400(A) and modified per earlier member comments at meetings and in e-mails.

Issue: Should there be a separate definition for "communication" in rule 7.1?

Some considerations: (1) RRC voted at 5/7/04 Meeting not to have a separate definitions section for this chapter on advertising & solicitation.

(2) Still outstanding is the issue of whether to have a separate definitions for all the rules, similar to Model Rule 1.0.

(3) What effect will having this separate definition have on the conformity with the ABA Model Rules which was one of the reasons for making this attempt to use the Model Rule format for the rules on advertising & solicitation?

(4) By referring to "advertisement" in subparagraph (e)(3), will a separate definition for "advertisement" be required?

15. Although the definition of "communication" is in a particular rule rather than a separate definition section for the entire chapter on advertising & solicitation, the word is used in other rules within the chapter. Therefore, the word "chapter" is preferable to "rule" here.

16. Per Tuft suggestion at 12/12/03 Meeting, "member's" has been added to modify "law firm."

17. Per Tuft suggestion, the clause "directed to any former, present or prospective client" has been deleted. *See* 12/10/03 Tuft E-mail to RRC List, #4, which states: "'Communication' being the broadest of the terms, should not be limited to a message or offer directed to a former, present or prospective client. 'Communications' includes an 'advertisement' which by definition is directed to members of the public and not to a specific person."

KEM Comment: On the one hand, "prospective client" arguably captures within it communications directed "to the public," but have nevertheless made the change. On the other hand, subparagraph (e)(3) refers to advertisements "directed to the general public." Question whether removing the clause will cause problems because it is a change of the current rule language?

Issue: Should clause "directed to any former, present or prospective client" be removed?

KEM Recommendation: Keep the clause in the rule. "Prospective client" captures "general public," and using the term "prospective client" in the preliminary statement reminds readers that this definition is about soliciting legal business. The concept that it also includes communications to the "general public" is reinforced by subparagraph (e)(3).

18. **Member comments**: 5/05/04 Tuft Memo, #3, questions "whether a domain name in Rule 7.0(a)(1) is a professional designation of a member or law firm." The model rules do not address domain name at all.

KEM Recommendation: remove reference to domain name in the rule.

19. **Member comments**: 12/10/03 Tuft Memo, #6, suggested that "or any other writing as defined in Evidence Code, section 250," be used in place of "other comparable writing." *See also* rule 3-310(A)(3), which uses the same term for "written" in the context of conflicts of interest.

KEM Response & recommendation: Substitution would be fine.

Issue: Should "any other writing as defined in Evidence Code section 250" be substituted for "other comparable writing"?

20. **KEM Note**: As suggested above, does use of "advertisement" in subparagraph (b)(3) require a separate definition of "advertisement"?

Issue: Is it necessary to have a separate definition for advertisement?

21. **Member comments**: 12/10/03 Tuft Memo, #8, states: "[(e)(4)] no longer captures the means by which lawyers communicate. If it is to be retained as an example of a targeted communication, it should be changed to read: 'Any unsolicited correspondence, electronic transmission or other writing directed to a former, present or prospective client.'"

KEM 5/28/04 Response: Is (e)(4) limited to targeted communications? Is it also intended to encompass a mass mailing?

Issue: Replace "Any unsolicited correspondence from a member or law firm directed to any person or entity" with "Any unsolicited correspondence, electronic transmission or other writing directed to a former, present or prospective client"?

Note that "from a member or law firm" would also be deleted. Was that intended?

22. **KEM Note**: I've redacted the ABA Comments as the drafting team's charge was to focus on the black-letter rule only in this draft. We will insert the comments once the rules are substantially completed.

23. **Member Comments**: 5/4/04 Sapiro E-mail, #13, states: "The concept contained in 7.2(b) is so distinct from the concepts contained in 7.2(a) and (c), that I think 7.2(b) should be a separate rule, and 7.2(a) and (c) should appear at the beginning of 7.1."

KEM 5/28/04 Response: First, I'm not so sure that the concepts covered by 7.2(b) belong in a separate rule. Both (b)(1) and (2) address payment for marketing of legal services, while (b)(4) refers to "strategic alliances," another form of marketing that the ABA recognized subsequent to the Ethics 2000 Commission Report. Subparagraph (b)(3) might seem a bit far afield, but I think the thought here is that a lawyer who purchases a law practice should not be subject to discipline for running afoul of an advertising regulation where the seller has, for example advised his or her clients that the practice has been sold to a "good lawyer" or something to that effect, and that the client(s) should retain that lawyer.

Second, as to placing 7.2(a) and 7.2(c) in rule 7.1, that motion was made at the 5/7/2004 Meeting and not seconded.

Issue: Should 7.2(b) be in a separate rule?

KEM Recommendation: Do not put 7.2(b) in a separate rule.

24. **Rule 1-320(C)** provides: "(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule." The **Discussion to rule 1-**

320 provides: "Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment."

> **KEM Recommendation**: I see no reason to use the California language rather than the ABA language. Note, however, that some of the provisions of 1-320 have been incorporated into proposed rule 1-310-X. ***See note 30, below.***
>
> **Member Comments**: 5/5/04 Tuft Memo, Rule 7.2, #2: Agrees with foregoing.

25. Phrase "legal services" added per suggestion of Mark Tuft (5/5/04 Tuft Memo, Rule 7.2, #4).

26. Phrase "not-for-profit or" that preceded the word "qualified" was deleted per suggestion of Mark Tuft (5/5/04 Tuft Memo, Rule 7.2, #4, states: "A significant difference between the ABA Model Rules and the California Rules is that California permits 'for-profit' lawyer referral services. Therefore, 'not-for-profit' should be deleted in (b)(2). Also, 'legal services' should be inserted before the word 'plan.'").

27. **Cal. B&P Code §6157.4** ("Lawyer Referral Service Advertisements -- Necessary Disclosures") provides: "Any advertisement that is created or disseminated by a lawyer referral service shall disclose whether the attorneys on the organization's referral list, panel, or system, paid any consideration, other than a proportional share of actual cost, to be included on that list, panel, or system."

28. **Note**: The second sentence of ABA MR 7.3(b) provides: "A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority." We substituted language that has been developed in the 2/20/04 draft of proposed rule 1-310-X. The Commission should also consider X-referencing B&P Code § 6155.

> **Issues**: (1) Is the substituted language acceptable?
> (2) Should the rule or rule discussion X-reference B&P Code § 6155?

29. **Member Comments**: 5/4/04 Sapiro E-mail, #11, states: "In 7.2(b)(4), first line, the last word is "professional." Why is that word needed? Are we impliedly thereby endorsing referral fee agreements with accountants, notaries, barbers, and medical doctors?"

5/5/04 Tuft Memo, Rule 7.2, #3, states: "Rule 7.2(b)(4) was added in 2002 to deal with 'strategic alliances' and other forms of association and affiliations among lawyers and non-lawyer professionals. This provision is consistent with the current draft of Rule 1-310X and should be included in the rule."

KEM 5/28/04 Response: Concerning Jerry's inquiry re "professional," please consider MR 7.2, cmt. [8], which was added with subparagraph (b)(4) at the ABA's 8/2002 Annual Meeting:

> "[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities."

Issues: (1) Should RRC include 7.2(b)(4) in its recommendation?
(2) If yes, should the rule include a Discussion paragraph similar to cmt. [8]?
See also **next note re 7.2(b)(4).**

30. Paragraph (b)(4), which was added to MR 7.2 after the Ethics 2000 Final Report (in 8/2002), combines concepts now found in two California Rules:

> Rule 1-320(B) ("(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.") **Note** that rule 1-320(A) addresses fee-sharing w/ a non-lawyer. *Cf.* MR 5.4(a).
>
> Rule 2-200 ("(B) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.") **Note** that rule 2-200(A) addresses fee splitting w/ another lawyer. *Cf.* MR 1.5(e).

Three Issues: (**1**) Does the RRC want to keep these two concepts (compensation to lawyers and non-lawyers for referrals) separate in the aforementioned rules?

(**2**) Does the MR approach of including the both concepts in a single rule that is placed with other provisions addressing payment for advertising sufficiently capture the gist of 1-320(B) and 2-200(B)? **Note**: With the current draft of 1-310-X, the Commission is already moving in the direction of the ABA approach, i.e., the substance of 1-320(A) [fee sharing w/ non-lawyers] has already been moved to the rule on "independence of judgment".

(**3**) Should 2-200(A) be moved to rule 4-200 ("Fees for Legal Services"). The ABA provision re fee-splitting w/ another lawyer is in MR 1.5(e). MR 1.5 is the model rule analogous to rule 2-200 ("Fees").

Member Comments: 5/4/04 Sapiro E-mail, #12, states: "Responding to the question raised in your footnote [22], I prefer to keep the concepts of referral fees to lawyers and to non-lawyers in one place, rather than in several rules."

5/5/04 Tuft Memo, Rule 7.2, #5, states: "I agree with KEM's recommendation to move Rule 1-320(B) and 2-200(B) to this rule and to use the ABA language."

KEM Recommendations: (1) Do not keep separate rules. Move 1-320(B) and 2-200(B) into this rule, and use the ABA language. 1-320(A) is already being moved to proposed rule 1-310-X and 2-200(A) can be moved into rule 4-200 ("fees for legal services"). 1-320(A) is covered by this rule's subparagraph (b)(1). ***See note 24.*** (2) The MR's approach of including both concepts in this rule's subparagraph (b)(4) makes sense.

Alternative recommendation: If Commission decides to keep the concepts in two separate rules, then the Discussion should read something like: "California has not adopted Model Rule 7.3(b)(4). The concepts expressed in that provision may be found in [rule 1-320(B)] and [2-200(B)] (or

whatever numbers these rules eventually have). (3) If Commission agrees to move 2-200(B) into this rule, then 2-200(A) should be moved into 4-200.

31. **Standard (12)** to rule 1-400 provides: "(12) A 'communication,' except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it."

Member comments: 5/5/04 Tuft Memo, Rule 7.2, #6, states: "Rule 7.2(c) is preferable to current Standard 12, because as it permits the name and office address of a law firm as well as a member responsible for the content of a communication made pursuant to this rule."

Interested Parties' comments: (1) 4/28/04 Cal Darrow E-mail to RRC list expressed concern with rule 7.3(c)'s requirements. Mr. Darrow's e-mail noted that lawyers sometimes engage in joint advertising and requiring a list of all lawyers involved in a 30 second radio or TV ad would be very restrictive. Mr. Darrow continued, suggesting three alternatives:

> "My suggestion is to either drop the office address requirement completely or to exempt joint advertisers from the office address requirement.
>
> The term 'office address' seems to require both a street address and town or city location. Though the majority of states don't require that any office location be listed in an ad, nine states require just the town or city name, eliminating the street address requirement. This might be a third option."

Mr. Darrow also noted the following: "The concept of group or joint advertising is still a relatively new concept and it allows solo and small firms to compete with larger or established firms by pooling their advertising dollars. The group advertising concept is noted in B & P Code §6155 (h) and in the Bar's Rules and Regulation Pertaining to Lawyer Referral Services (Rule 4.1)."

(2) 5/5/04 Myles Berman E-mail to RRC, #1, stated: "Rule 7.2 (c) Including office addresses in print media consumes precious space. Listing of the firm's name and telephone number sufficiently identifies the advertising attorney."

(3) 5/5/04 William Balin E-mail to RRC, re Mr. Berman's comment: "With respect to Mr. Berman's comment regarding rule 7.2 (print advertising must carry office address), I support the proposal and disagree with Mr. Berman's comment. There are certain members of the criminal defense bar (and others) who place ads in numerous counties surrounding the city where they have ONE office. Each ad displays a LOCAL phone number and NO ADDRESS. These ads make it seem as though the attorney is a local attorney. When a prospective client calls the office to seek representation, the attorney sends out a "business manager" who signs up the client AT THE CLIENT'S HOME OR OFFICE, thus leading the client to believe that the lawyer is a local lawyer when that is not the case. I think that such advertising is misleading at best and downright fraudulent at worst."

Issues: (1) ABA language or Standard (12)?
(2) Should the rule address the space concerns raised by Messrs. Darrow & Berman?
(3) Should the rule address the concept of group advertising?

KEM recommendation: (1) As to whether to use the ABA language or the language of Standard (12), there is no good reason to use the California language instead of the ABA language. Use the ABA provision. Perhaps note in the Discussion that "former Standard (12) to rule 1-400 provided ...."

(2) As to the space and group advertising issues raised by Messrs. Darrow and Mr. Berman, Mr. Berman's suggestion works where only a single lawyer or firm is advertising, but does not address Mr. Darrow's concerns about group advertising. Mr. Balin also raises a concern. One way to address all

concerns is require a phone and home city, if not an entire address, i.e., rewrite the provision as follows:

> "(c) Any communication made pursuant to this rule shall include the name, home city, and telephone number of at least one member or law firm responsible for its content. Where a group of lawyers engage in cooperative advertising, any communication made pursuant to this rule shall include the name, home city and telephone number of at least one member of the group responsible for its content."

In addition to the change to rule language, a Discussion paragraph would recognize that lawyers sometimes engage in group advertising, etc., with perhaps a X-reference to B&P Code § 615 5 Mr. Darrow provided.

32. This rule addresses what is denominated in current rule 1-400 as "solicitation". As you read the rule, please note that it accomplishes what 1-400(C), which prohibits solicitations, without defining solicitation. That is because the concept covered by the definition set out above in rule 7.0(c) – uninvited live (in-person or telephonic) contact with a prospective client – is covered by the different provisions of the rule. Therefore, the Commission might consider not including a definition for "solicitation".

33. **KEM Recommendation**: Include "live;" it has been added here for uniformity, as **Model Rule 7.3** refers to "live" telephone contact. Comment 2 to MR 7.3 impliedly approves of *pre-recorded* messages: "Advertising and written and recorded communications which may be mailed or *autodialed* make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in person, telephone or real-time electronic persuasion that may overwhelm the client's judgment." (Emphasis added).

Member comments: 5/4/04 Sapiro E-mail, #3, states: "I would not use the phrase "live telephone." I always thought a telephone was an inanimate object. On the other hand, I disagree with limiting a prohibited solicitation to "live" telephone contact. The conduct which I would find offensive could as easily occur if a computer-generated telephone call is directed only at occupants of hospital beds. However, that would not come within the scope of the prohibited conduct."

KEM 5/27/04 Response & Recommendation: Computer-generated telephonic hospital bed contact is covered under rule 7.3(b)(2), regardless of whether it would pass muster under a "live telephone" rule. The real issue here whether the ABA language should be changed, which I believe would cause more problems than would be gained by removing the word "live." "Live" communicates to the members that it is the potential for overreaching by lawyers by "live" back and forth persuasion that the rule seeks to regulate, not the members' free speech rights to communicate their availability for legal services. As for telephones being inanimate objects, tell that to people for whom cell phones have become permanent appendages. :-)

34. **MR 7.3** uses "real-time electronic contact" to reach situations, such as chat rooms and instant messaging, that provide the same kind of pressure (as in-person and telephonic communications) that presumably denies the client time for reflection in deciding which lawyer to retain.

Member comments: (1) 5/5/04 Tuft Memo, Rule 7.0, #6, states: "Including 'real time electronic contact' as a prohibited solicitation is not necessarily limited to 'chat' rooms."

(2) 5/5/04 Tuft Memo, Rule 7.3, #3, states: "I believe that the concept of "real time electronic contact" extends to more than a "chat room." With changing technology, "real time" communications may become more the rule than the exception. I have concerns on First Amendment grounds about including real time electronic contact as a prohibited form of communication in an era of "virtual" law practice. If the Commission decides to include this provision in the rule, we should draw specific attention to it and solicit comments from the public and the Bar whether the prohibition should be included in the final version of the rule."

KEM 5/27/04 Response: See above observation that it would also apply to "instant messaging." Consider also the future with the advent of the next generation Internet. *See, e.g.*, Anne Midgette, *Classical Finally Cracks the Internet*, N.Y. Times (05/23/04) [http://www.nytimes.com/2004/05/23/arts/music/23MIDG.html?th=&pagewanted=print&position=], which discussed the next generation of Internet. The subject of the article is about how symphony orchestras have begun conducting auditions on Internet2, which affords a much wider bandwidth than the present Internet. Now available primarily through Supercomputer Centers, such "fast" Internets will eventually allow people to appear virtually in real time, bringing with it the precise kind of conduct – e.g., overreaching by lawyers – that rule 7.3 is intended to regulate. While this technology is probably decades in the future, "real time electronic contact" should cover it. The real issue is whether the RRC believes that chat rooms warrant the same kind of regulation as telephonic or in-person communications.

KEM Recommendation: Agrees with Mark that we should highlight this phrase and solicit public comment on it. At a minimum, however, the phrase "real time electronic conduct" should be included in the draft rule.

35. The bolded language is taken from current rule 1-400(C).

Issue: Should the bolded language be be included?

Member Comments: (1) 5/4/04 Sapiro E-mail, #15, states: "If we are going to keep the approach in 7.3(a), I prefer leaving in the phrase "the communication is protected from abridgement by the Constitution . . . ." I think the prohibition against solicitation is overbroad, and leaving this phrase in permits a court on a given occasion to find that a solicitation was constitutionally permissible and not have to declare the entire prohibition constitutionally void in order to find the solicitation permissible. An example of the kind of overbreadth of which I am concerned is the following example of a perfectly innocent conversation between a lawyer and a sophisticated business executive: "What do I have to do to have your corporation hire me to represent it?" This kind of conversation goes on daily, and I cannot see anything inherently improper in it."

(2) 5/5/04 Tuft Memo, Rule 7.3, #2: Do not include the language.

Interested Parties comments: 5/5/04 Myles Berman e-mail, #2, states: "Adding language relating to protected speech per US and California Constitutions creates more problems due to impossibility to clarify the meaning of same. Sufficient existing case law would suffice. However, that case law is developing, is in a constant state of flux and varies from state to state."

KEM Recommendation: Do not include the language, which appears to be a vestige of a time (late 1970s, following *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 97 S.Ct. 2691) when the field of lawyer advertising was an unknown. It is a given that if the communication is protected under the First Amendment or the California Constitution, discipline cannot be imposed. It does not add much to the rule in terms of guidance.

36. A suggestion was made in an earlier draft to include the following, separate paragraph in place of (a)(1): "Direct lawyer-to-lawyer communications shall not be prohibited."

KEM Recommendation: The ABA language adequately communicates that live contact with other lawyers is permitted. No good reason not to use the language.

37. California does not at present have the "close personal" modifier of "relationship.

KEM Recommendation: include. As the Chair noted in his 12/9/03 e-mail, "it encompasses relationships that are not 'family' dependent, e.g., roommate, lover, etc," but which are nevertheless relevant to the concern of this rule that the lawyer may overreach.

38. The concept of "real time electronic contact" is intended to reach technologies such as "chat rooms," which presumably involve real time electronic communication and therefore the threat of overreaching by

the lawyer, but which are not covered by the current language of 1-400 which refers only to communications "delivered in-person or by telephone." See also Ethics 2000 Reporter's Explanation of Changes to Model Rule 7.3 ("Differentiating between e-mail and real-time electronic communication, the Commission has concluded that the interactivity and immediacy of response in real-time electronic communication presents the same dangers as those involved in live telephone contact.") ***See also*** **note 35, above.**

KEM Recommendation: Include the language, but as previously recommended, highlight this phrase and solicit public comment on it.

39. **Note #1**: MR 7.3(b)(2) reads: "the solicitation involves coercion, duress or harassment." I have replaced that language with the bolded language taken from 1-400(D)(5) and included it in (b)(2). Rule 1-400(D)(5)'s language struck me as a better statement of the kind of conduct that the rule is attempting to prohibit. *See also* rule 1-400, Standards (3) and (4), which address specific conduct.

Member comments: (1) 5/5/04 Tuft Memo, Rule 7.3, #4, states: "Rule 7.3(b)(2) represents a short coming in the ABA model rules. Communications that involve intrusion, coercion, intimidation, etc. cover more than in-person contacts. The concept in Rule 1-400(D)(5) should be maintained in our rules. As discussed above, this should be included in Rule 7.1."

(2) 5/4/04 Sapiro E-mail, #16, states: "I am concerned about the use of the word "intrusion" in 7.3(b)(2). To me, every uninvited form of advertising is intrusive. Not all intrusions, however, are impermissible."

KEM 5/28/04 Response: (1) Rule 7.3(b)(2) is not limited to in-person conduct ("A member shall not solicit . . . *by written, recorded or electronic communication* ***or*** by in person, telephone ...")

(2) I have no problem with removing the word "intrusion".

KEM Recommendation: (1) Standards (3) and (4) can be included in the Comment to rule 7.3.

(2) Keep 7.3(b)(2) the same, but delete the word "intrusion". Rule 7.3(b)(2) would still adequately cover the concept contained in present 1-400(D)(5).

Note 2: The one concept contained in 1-400's definition of "solicitation" that is not included in Model Rule 7.3 is that contained in 1-400(B)(2)(b), which prohibits a communication for pecuniary gain that is "directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication."

Member comments: 5/5/04 Tuft Memo, Rule 7.3, #5 states: "The concept in current Rule 1-400(B)(2)(b) should also be included in Rule 7.3(b)."

KEM Recommendation: Do not include this concept in a rule on solicitation. The conduct is already covered under 2-100 ("Communication with a Represented Party"). Although rule 2-100 is limited to "parties," the Commission may decide that its protections should be extended to any represented person. *Cf.* Model Rule 4.2 ("Communication with **Person** Represented by Counsel").

40. Rule 1-400(D)(4) provides: "A communication or a solicitation (as defined herein) shall not: * * * (4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be."

KEM Note: Paragraph (c) addresses direct-targeted mailings to prospective clients (e.g., a mass disaster such as a plane crash, where the lawyer specifically targets the survivors or surviving family of the deceased. These situations are hybrid situations. On the one hand, they are not advertisements that are intended for the general public. On the other hand, they do not raise the identical concerns re overreaching that live contact with prospective clients do. Nevertheless, they may involve some of the concerns with solicitation, for example, the lawyer would likely realize that the day after a

disaster the surviving family members are in a tenuous emotional state and might not be in a position to make decisions about legal representation. *Cf.* Standard (3).

Interested Parties comments: 5/5/04 Myles Berman E-mail, #3, states: "Adding "Advertising Material" at beginning and end of any of recorded or electronic transmission (television and radio) is redundant as these type of ads are self identifying and the public is well are they are ads. It also takes up precious time."

KEM 5/28/04 Response: I have added an exception clause to paragraph 7.2(c) to address Mr. Berman's concerns.

Issue: Should paragraph 7.2(c) include the additional exception clause, "or unless it is apparent from the context that the communication is an advertisement."

KEM Recommendation: Make the modification, but otherwise keep paragraph (c) as it is in the ABA Model Rule. Rule 1-400 has Standard (5), but paragraph (c) specifically addresses direct-targeted mailings, which probably should be in the rule proper. My reading of the rule is that it is addressed to direct targeted mailings (or recorded phone calls), e.g., a letter that is sent to an identified person who is need of legal representation (e.g., the lawyer obtains a list of names and addresses of accident victims in a mass disaster and proceeds to send letters to those people ("soliciting professional employment from a prospective client *known to be in need* of legal services *in a particular matter* . . ." [Emphasis added].) Although I don't think the concerns Mr. Berman has raised are applicable here, if the RRC decides to use language more akin to Standard (5), see below, the exception clause suggested above should address those concerns.

Note, however, that Standard (5) is broader, apparently applying not only to direct-targeted mailings, but also to mailings to the general public.

Standard (5) provides: "(5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word 'Advertisement,' 'Newsletter' or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word 'Advertisement,' 'Newsletter' or words of similar import on the outside thereof." Standard (5) could be included in the Discussion.

41. Paragraph (d) appears to run afoul of Cal. Rule 13.3 of the RULES AND REGULATIONS PERTAINING TO LAWYER REFERRAL SERVICES (Appendix B to Publication 250), which provides: "13.3 No referral shall be made which violates any provision of the State Bar Act or Rules of Professional Conduct, including, but not limited to, restrictions against unlawful solicitation and false and misleading advertising."

KEM Recommendation: I don't think the conduct allowed in paragraph (d) is something that should be discouraged. I recommend that the Commission adopt this concept and/or language and in its report, recommend that standard 13.3 be amended.

Member comments: 5/4/04 Sapiro E-mail, #17, agrees.

42. **KEM Note**: The Ethics 2000 MR 7.4 is nearly the same as the pre-2002 version of MR 7.4. Of the 17 states for which I currently have Ethics 2000 Reports, only two (Florida and Oregon) have not adopted MR 7.4 at all. In the case of Oregon, which is moving from the ABA Code to the Model Rules, its Ethics 2000 Commission has addressed specialization in proposed Oregon Rule 7.1. Florida had an extensive set of advertising rules before Ethics 2000; its Ethics 2000 Commission has declined to adopt the Ethics 2000 approach and recommended that Florida keep its own rules. Of the remaining 15 states, all of them except Indiana and Louisiana have a specific reference to Patent and Admiralty law, with two (Illinois and So. Carolina) also referring expressly to "Trademark Law". The greatest variation is found in rule

7.4(d) due to the states various approaches to specialization and certification.

43. Montana adds the following sentence to its rule 7.4(a): "A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, if such communication does not imply an unwarranted expertise in the field so as to be false or misleading under Rule 7.1."

Issue: Should California also include a concept similar to the Montana rule in either(1) the rule proper; or (2) the Discussion?

Member comments: 5/5/04 Sapiro E-mail, #18, agrees.

KEM Recommendation: Add the Montana concept.

44. As noted above, nearly all states that have adopted or recommended the Ethics 2000 rule 7.4 include references to Patent and Admiralty law specialties. South Carolina covers both, as well as Trademark lawyers, in a single paragraph: (d) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designations "patents," "patent attorney," "patent lawyer," or any combination of those terms. A lawyer engaged in a trademark practice may use the designations "trademarks," "trademark attorney," or any combination of those terms. A lawyer engaged in admiralty practice may use the designations "admiralty," "proctor in admiralty," "admiralty attorney," or any combination of those terms.

KEM Recommendation: California should include reference to the Patent and Admiralty specialties. There is no good reason not to use the ABA language.

Member comments: 5/5/04 Sapiro E-mail, #18, agrees.

45. **MR 7.4(d)(1)** provides: "(1) the member has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association." I have replaced that language with language from rule **1-400(D)(6)**.

KEM Recommendation: Use the language I have inserted from Rule 1-400(D)(6), which provides: "(D) A communication or a solicitation (as defined herein) shall not: * * * (6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification." It more accurately reflects the California situation.

Member comments: 5/5/04 Sapiro E-mail, #18, agrees.

46. The closest analogy in California to paragraph (a)'s first sentence is Standard (9) to rule 1-400, which provides the following is a presumed violation of rule 1-400: "(9) A 'communication' in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community."

KEM Recommendation: use the ABA language. Standard (9) can be included in the Discussion.

Member comments: 5/5/04 Sapiro E-mail, #18, agrees.

47. The closest analogy to paragraph (a)'s second sentence in California is Standard (6) to rule 1-400, which provides the following is a presumed violation of rule 1-400: "(6) A 'communication' in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization."

KEM Recommendation: use the ABA language. Standard (6) can be included in the Discussion.

Member comments: 5/5/04 Sapiro E-mail, #18, agrees.

Interested Parties' comments: 5/5/04 Myles Berman e-mail, #4, states: "Generally, the prohibition of the use of Judge Pro Tem or similar language should be address in these rules as well as the Judicial Canon of Ethics. This issue may have been addressed here but I did not see it."

KEM 5/28/04 Response to Berman comment: Before Ethics 2000, the issue was addressed in the advertising rules. However, it is now covered in MR 8.4, which addresses "Misconduct". MR 8.4 (e) provides: "It is professional misconduct for a lawyer to: * * * (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law." Similarly, proposed rule 1-120X(E) provides: ""It is professional misconduct for a member to: * * * (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these rules or other law."

In the Ethics 2000 Reporter's Explanation of Changes re MR 8.4(e), the Reporter explained: "Rule 7.1 currently provides that a lawyer may not make a false or misleading communication about the lawyer or the lawyer's services and, further, that a communication is false or misleading, inter alia, if it "states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law." The Commission recommends that this prohibition be moved out of Rule 7.1 and added to paragraph (e) in order to clarify that the prohibition is not limited to statements made in connection with marketing legal services."

48. According to the Ethics 2000 Reporter's Explanation of Changes for rule 7.5, the phrase "other professional designation" was added to paragraph (b) "to clarify that the Rule applies to website addresses and other ways of identifying law firms in connection with their use of electronic media." It should be noted, however, that the phrase appeared in paragraph (a) of 7.5 before Ethics 2000.

49. The ABA language has been left intact, as has been done by other states that have adopted MR 7.5. One possibility would be to change paragraph (b) slightly to read: "A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm in California shall indicate the jurisdictional limitations on those not licensed to practice in California."

KEM Recommendation: Keep the ABA language; there's no pressing need to make the provision California-specific, especially as no other state has done so.

Note: There is no provision in California analogous to MR 7.3(b).

50. The closest analogy to paragraph (c) in California is Standard (6) to rule 1-400, which provides the following is a presumed violation of rule 1-400: "(6) A 'communication' in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization."

Note: This provision is not really analogous, as paragraph (c) seeks to prevent a firm from using the name of a person who is in government service, while Standard (6) applies only to a "member in private practice."

KEM Recommendation: Use the ABA language, even though using the name of a former partner now in government service is probably already covered as "false" under rule 7.1.

51. The closest analogy to paragraph (d) in California is Standard (7) to rule 1-400, which provides the following is a presumed violation of rule 1-400: "(7) A 'communication' in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists." I have substituted that language for ABA MR 7.5(d), which provides: "Members may state or imply that they practice in a partnership or other organization only when that is the fact."

Issue: Do you agree with the substitution? The more specific language of Standard (7) appears warranted here.

52. This provision has been added to the rule. The concept is currently contained in Standard (8) to rule 1-400, which provides the following is a presumed violation of rule 1-400: "A 'communication' which states or implies that a member or law firm is "of counsel" to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172) which is close, personal, continuous, and regular."

Member comments: (1) 5/4/04 Sapiro E-mail, #19, states: "I disagree with the substance of 7.5(e). Although I acknowledge that the concept contained in that paragraph is a correct statement of current law, it seems to me that if a retired lawyer wants to assume the risk of potential vicarious liability for misconduct of his or her former partners, a retired lawyer ought to be able to allow his or her name to remain on the letterhead as "of counsel" because of his or her traditional relationship with the former firm."

(2) 5/5/04 Tuft Memo, Rule 7.5, #1, states: "I am concerned about including Rule 7.5(e) as a rule rather than as a presumption. The term "of counsel" has many different applications and is only false and misleading if the lawyer making the communication fails to disclose the true nature of the relationship. All "of counsel" relationships are not necessarily close, personal, continuous or regular. ABA formal opinion 90-359 discusses this issue."

Issue: Does the RRC agree with the addition of this provision of the ABA Model Rules?

53. The rule had its genesis in 1993, when the new chair of the SEC targeted "pay-to-play," the practice of brokers making political contributions to political candidates who, if elected, could influence the choice of underwriters on government projects. It was not adopted by the House of Delegates until 2000. I believe there had been a problem involving New York's Comptroller and the hiring of law firms to represent the state. Has there been a similar problem in California? When I researched the rules of all the states in early summer 2002, I discovered that not a single state had adopted rule 7.6. Of the seventeen states for which I have Ethics 2000 Reports, only four (Delaware, Idaho, Michigan and South Dakota) have adopted the rule or have had their Ethics 2000 review commissions recommend its adoption. The rule has been lumped with the advertising rules because of its relationship to MR 7.2(b) (which prohibits lawyers from paying others to recommend their services).

Member comments: 5/4/04 Sapiro E-mail, #20, states: "I suggest we consider Model Rule 7.6. The "pay to play" problem does not just arise in underwriting of public securities. Judges sometimes seem to reach out to find cases in which they can appoint a referee or special master as a payback to a political supporter. This is one of the bad aspects of contested judicial elections.

KEM 5/28/04 Response: I have added the rule text for consideration by the RRC. Members and interested parties might like to read the following article that appeared in the L.A. Times: Patrick McGreevy, "L.A.'s Legal Bills Surge: Most of the law firms give to Hahn, Delgadillo campaigns, L.A. Times (May 16, 2004) (http://www.latimes.com/news/local/la-me-attorney16may16,1,1735103.story?coll=la-home-local) I can provide a copy to anyone who is interested.

KEM Recommendation: Consider the rule, but unless there is a documented, widespread problem, do not adopt.

RULE 7.0. DEFINITIONS

~~(a) For purposes of this chapter, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a member's law firm directed to any former, present, or prospective client, including but not limited to the following:~~

~~(1) Any use of firm name, trade name, fictitious name, **domain name**, or other professional designation of such member or law firm; or~~
~~(2) Any stationery, letterhead, business card, sign, brochure, **internet web page or web site, e-mail, or other written document sent by electronic transmission,** or other comparable written material describing such member, law firm, or lawyers; or~~
~~(3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or~~
~~(4) Any unsolicited correspondence from a member or law firm directed to any person or entity.~~

~~(b) For purposes of this chapter, "Advertise" or "advertisement" means any communication, disseminated by television or radio, **or any other electronic medium, including a computer network**,[2] or by any print medium including, but not limited to, newspapers and billboards, or by means of a mailing directed generally to members of the public and not to a specific person, that solicits employment of legal services provided by a member, and is directed to the general public and is paid for by, or on the behalf of, an attorney.~~

~~(c) For purposes of this chapter, **to "solicit" or** a "solicitation" means **the initiation of**[3] any communication:~~

~~(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and~~

~~(2) Which is:~~

~~(a) delivered in person or by **live**[4] telephone, **or through real-time**~~

ENDNOTES THAT WERE DELETED OR WHICH STILL NEED TO BE ADDRESSED:

Endnote – Deleted

Endnote – Deleted

Endnote – Use of "live" to modify "telephone". *See* rule 7.3.

Endnote – Use of "real-time electronic ~~contact,[5] or~~

~~(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.~~

~~(D) "Electronic medium" **includes, without limitation,** means television, radio, or **and** computer networks."[6]~~ contact" in rule 7.3 re solicitation.

Endnote – Term "electronic medium," which is used in B&P Code § 6157.

RULE 7.1. COMMUNICATIONS CONCERNING A MEMBER'S SERVICES

(a) A member shall not make a false or misleading communication as defined herein ~~about the member or the member's services~~.

(b) A communication is false or misleading if it:

(1) Contains any ~~[**material**]~~ untrue statement; or

(2) Contains any misrepresentation of fact or law; or

(~~2~~3) Contains any matter, or presents or arranges any matter in a manner or format which is ~~[**materially**]~~ false, deceptive, or which confuses, deceives, or misleads the public; or

(~~3~~4) Omits to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not ~~[**materially**]~~ misleading to the public.

(c) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule ~~1-400~~. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

(d) A member shall retain for two years [one year] a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

(e) For purposes of this ~~rule~~ **chapter**, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a **member's** law firm ~~directed to any former, present, or prospective client~~, including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name, **domain name**, or other professional designation of such member or law firm; or

(2) Any stationery, letterhead, business card, sign, brochure, **Internet web page or web site, e-mail, or other written document sent or posted by electronic transmission,** or other comparable written material describing such member, law firm, or lawyers; or

(3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or

(4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

Comment

RULE 7.2. ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a member may advertise services through written, recorded or electronic communication, including public media.

(b) A member shall not give anything of value to a person for recommending the member's services except that a member may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal services plan or a ~~not-for-profit or~~ qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California;

(3) pay for a law practice in accordance with rule 2-300; and

(4) refer clients to another member or a nonmember professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the member, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one member or law firm responsible for its content.

RULE 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A member shall not by in person or, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the member's doing so is the member's pecuniary gain, unless [**the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California or**] the person contacted:

(1) is a lawyer; or

(2) has a family, **close personal**, or prior professional relationship with the member.

(b) A member shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or **real-time electronic contact** even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the member a desire not to be solicited by the member; or

(2) the solicitation is transmitted in any manner which involves **intrusion**, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

(c) Every written or, recorded or electronic communication from a member soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.

(d) Notwithstanding the prohibitions in paragraph (a), a member may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the member that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

RULE 7.4. COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

(a) A member may communicate the fact that the member does or does not practice in particular fields of law.

(b) A member admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;

(c) A member engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A member shall not state or imply that a member is certified as a specialist in a particular field of law, unless:

(1) the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors; and

(2) the name of the certifying organization is clearly identified in the communication.

RULE 7.5. FIRM NAMES AND LETTERHEADS

(a) A member shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a member in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a member holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the member is not actively and regularly practicing with the firm.

(d) A member may state or imply that the member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 only when such relationship in fact exists.

(e) A member may state or imply that the member or member's law firm is "of counsel" to another lawyer or a law firm only if the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172) which is close, personal, continuous, and regular.

RULE 7.6. POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

ENDNOTES

[REDLINE OF ENDNOTE TEXT NOT PROVIDED IN THIS ELECTRONIC VERSION OF AGENDA MATERIALS. SEE ABOVE FOR ENDNOTES IN CLEAN VERSION OR REFER TO A HARD COPY SENT BY STAFF]

3/21/04 KEM E-mail to Drafting Team:

Greetings all:

As agreed at the 2/20/04 meeting, I've taken a shot at generating a set of advertising & soliciting rules based on the Model Rules template. I've attached an annotated version of the draft in WP and Word. I've also attached a red-line, comparing my efforts to the Model Rules on advertising (rules 7.1 to 7.6) as of 8/2002, the last time the advert rules were amended.

Some comments:

1. Overview. The team was charged with drafting a set of rules that used MR 7.1 to 7.6 as a template. We were also asked to use the ABA language unless there was a good reason to use different language.

a. Please just look at either the WP or Word version of the clean draft. It's a much longer document than I think we should provide the full Commission. I've annotated it extensively with endnotes to give you background on the drafting "choices" I made (I used endnotes rather than footnotes because there's less clutter that way, but if you prefer, I can provide you with a footnote version).

b. Please let me know if you agree with my decisions. I've tried to flag the issues in the endnotes. In some places it states "KEM Recommendation". In other places it states "Question". Please let me know if you agree with my choices or recommendations. Probably the easiest way to do so is to refer to the endnote number where there's a question or a recommendation and just say you agree or not (if the latter, please let me know what you prefer.)

2. Draft needs to be edited extensively. I do not want to present the attached to the full Commission. People will simply complain that it is too complex. It's not. Really. What makes it appear complex is all the endnotes and once I hear from you, I want to delete most of those.

3. ABA rule comments. I also intend to delete the comments to the ABA rules for this go-around. I only included them here for your convenience. The vote at the last meeting was to work on the rules only. If the Commission wants to proceed, we'll tinker with the comments for the next meeting.

4. Standards. I think the Standards should appear in the Discussion, unless a standard's substance is already addressed in the ABA rule language itself (I've pointed out where this occurs in each of the rules.) I've placed the various standards in their respective rules for the drafting team's convenience. I propose deleting those standards, however, in the draft we provide the full Commission.

5. Definitions. I've come around to Mark Tuft's view that we don't need definitions. However, I suggest that for this go-around we include the definitions as new rule 7.0. I think the discussion at the 5/7 & 5/8 meeting will lead to the same conclusion.

Our deadline is this Thursday, March 25, at 2:00 p.m. Can you please get back to me by this Wednesday, 3/24 at 3:00 p.m. so I can get this into shape for circulating to the full Commission? Please let me know if that is doable.

Thanks much,

Kevin

3/25/04 KEM E-mail to Lauren McCurdy, copy to Drafting Team:

Greetings Lauren:

As we just discussed, I've attached revised versions of the first draft of our ad & solicit rules using the Model Rules as a template. There is a clean version in WP and a red-line, comparing draft 1 to the current Model Rules 7.1 to 7.6, in both WP and PDF. I've also attached a four-page document that sorts the current rule 1-400 standards by the model rules to which they are most closely related. That is in WP.

I've made the following changes to the draft to the drafting team earlier this week:

1. I've deleted the rule 1-400 standards from the draft to reduce the "clutter" effect. See the four-page attachment for how the standards related to each model rule.

2. I've deleted the model rule comments from the rules. We were charged on this round with addressing the rules only. This also reduces clutter.

3. We were also charged with keeping the ABA language unless there was a good reason for not doing so. In some instances, I have substituted language from California rules because I thought they increased clarity. I've flagged each instance in which I've done that and included the ABA language for comparison in the endnote.

4. In the end notes, I have often given my recommendation for what language to use when there is a question. In other instances, I had no recommendation.

I think that about covers it. Thanks much for your great work in putting this mailing together.

Kevin

4/12/04 Sondheim E-mail to RRC List:

Commission Members--

Hopefully, you are now aware that, as stated at our last meeting, I am trying to expedite the processing of our work product. In that regard, one of the methods I mentioned at that meeting to "speed up our drafting" was, absent some overriding need for discussion, to deem a draft as approved without much discussion if there have been no e-mails from Commission members objecting to a draft and no public input objecting to that draft.

In accordance with the parameters provided by the Commission at the last meeting, Kevin Mohr has now crafted (crafting is even better than drafting) a revision of 1-400 setting forth tentative rules and some recommendations relating thereto. It is my understanding that he circulated this draft to the drafting team assigned to that rule and to date has received no objections to his draft from that team. In accordance with what I have set forth in the first paragraph of this e-mail, his draft of the following rules and his recommendations relating thereto will be deemed as tentatively approved by the Commission for posting on our website except to the extent that, prior to our next meeting, there are specific objections, set forth in an e-mail, to a rule, or portion thereof, or to a recommendation:

1. Rule 7.0 and the recommendations relating thereto except for the issues raised in footnote 1.

2. Rule 7.1 and the recommendations relating thereto except for the issues raised in footnotes 7, 8, and 10-12.

3. Rule 7.2 and the recommendations relating thereto except for the issues raised in footnote 17. In (b)(2) the following highlighted words seem to have been inadvertently left out and, absent objection, will be deemed to be included in (b)(2): "pay the usual charges of a legal services plan" etc.

4. Rule 7.3 and the recommendations relating thereto except for the issue raised in footnote 19.

5. Rule 7.4 and the recommendations relating thereto except for the issue raised in footnote 28.

6. Rule 7.5 and the recommendations relating thereto except for the issues raised in footnotes 36 and 37.

7. Rule 7.6 would not be adopted pursuant to the recommendation of Kevin.

Bottom line: ***Either raise, by e-mail prior to the next meeting, any objections you may have to the rules and recommendations noted above or (absent objections from the public prior to the next meeting) seal your lips at least until these tentative rules are posted on the Commission's website***.

Cheers,

Harry

4/28/04 Cal Darrow E-mail to RRC List (transmitted by Felicia Soria):

Commission Members, Liaisons and Interested Persons:
The following is being forwarded at the request of Cal Darrow.

Thanks to Kevin Mohr for his prodigious effort on proposed Rule 1-400. He should be awarded the Bar's equivalent of the Medal of Honor.

I have a suggestion regarding model Rule 7.2 (c). The requirement of listing both the name and office address of one member or law firm seems to assume that only one lawyer / law firm is advertising and not, as is sometimes the case, a group of independent lawyers advertising together (joint or group advertising). If there is a joint advertisement for several lawyers on radio or T.V., there is both a time (radio & T.V.) and space (T.V.) limitation. These kinds of ads are usually 30 seconds long (sometimes less, seldom more) and the time and space for the advertising message is already limited. Any requirement that addresses be listed along with several names would be very restrictive. My suggestion is to either drop the office address requirement completely or to exempt joint advertisers from the office address requirement.

The term "office address" seems to require both a street address and town or city location. Though the majority of states don't require that any office location be listed in an ad, nine states require just the town or city name, eliminating the street address requirement. This might be a third option.

The concept of group or joint advertising is still a relatively new concept and it allows solo and small firms to compete with larger or established firms by pooling their advertising dollars. The group advertising concept is noted in B & P Code §6155 (h) and in the Bar's Rules and Regulation Pertaining to Lawyer Referral Services (Rule 4.1).

Please call me if you have any questions.

Cal Darrow
(925) 837-3877

5/3/04 Melchior E-mail to RRC List (transmitted by Lauren M on 5/4/04):

To: Lauren McCurdy
for Commission distribution
Date: May 3, 2004
Subject: Comment on Proposed Rule 1-400.

I appreciate Kevin's elegant exegesis of our (wordy and complex) rule and of the ABA's (equally wordy and complex) set of rules. In light of my repeated comments that we are making the rules too esoteric, and further considering the facts that (a) there has been a quantum jump in "communications" since the good old days of Bates v. Arizona, etc. and (b) there has been to my knowledge little if any enforcement of Rule 1-400, can't we take a look at this problem and try to strip the Rule to its essentials: no false statements; no intrusive solicitation; no representation that one is what one in fact is not?

I get e-alerts, conflicts, circulars, warning sheets, etc. from various law firms many times each month; and like my partners, I am asked by our marketing people to develop such material for distribution. This industry has totally overtaken all regulatory attempts, and I believe that we are still ordering a tentative, toe-in-the-water approach when the world is out there doing ocean swimming.

I could comment at length on the many interesting posers put by Kevin in his exemplary exercise, but in the light of the foregoing I will refrain.

5/4/04 Sapiro E-mail to RRC List:

Dear Kevin:

I have the following suggestions regarding your magnum opus dated March 25, 2004.

1. I am concerned about using the phrase "computer network" in 7.0(b). To me, a computer network is a closed system. I think it would be preferable to refer to the internet. Otherwise, if I send an advertisement over a local area network, my advertisement is regulated by the proposed rule, but if I send the advertisement over the internet, it will not be regulated. In 7.0(b), I am also concerned that the definition of an advertisement is too narrow. If an advertisement solicits employment of legal services provided by a firm, as opposed to legal services provided by an individual member, is it exempt from our regulation?

2. I agree with you that "the initiation of" should be deleted from the definition of "solicit." If "solicitation" is an evil (a concept with which I disagree except in specific, limited circumstances) it is not the "initiation of" a solicitation that is offensive. It is the consummation of the solicitation that should be an offense.

3. In 7.0(c)(2)(a), I would not use the phrase "live telephone." I always thought a telephone was an inanimate object. On the other hand, I disagree with limiting a prohibited solicitation to "live" telephone contact. The conduct which I would find offensive could as easily occur if a computer-generated telephone call is directed only at occupants of hospital beds. However, that would not come within the scope of the prohibited conduct.

4. I have the same concern about the phrase "computer networks" in 7.0(D) [sic] as expressed regarding its counterpart in 7.0(b).

5. In 7.1(b)(1), I would leave in the word "material." Otherwise, if a communication includes the following dialogue, it could be a violation: "How are you?" "Fine" when the speaker is actually ill. Obviously, we do not need to have an advertising rule that gets down to this level.

6. I like the concept of splitting Model Rule 7.1 into two separate paragraphs. However, it strikes me on reading 7.1 in context that what is now Rule 7.2(a) ought to precede what is now proposed 7.1(a). See paragraph 13, infra.

7. I prefer using our Rule 1-400(D)(1)-(3) instead of the second sentence of Model Rule 7.1. However, as indicated above I would prefer to use the word "material" or the word "materially" in all three places.

8. That having been said, when I read 7.1 in context, it struck me that 7.1(b) is really a definition. If we are going to have a "definitions" rule, shouldn't this definition also be in the definitions?

9. If we are going to have Board of Governors standards in the future, I think the effect of the standards should continue to be stated as part of the rule, not as part of the discussion. Because of the presumption under Evidence Code sections 605 and 606, this provision is substantive law, not merely commentary on a matter of substance.

10. In Rule 7.1(d), whether we should have the retention requirement for two years or one year I think should be left to the Office of Trial Counsel. They are the ones who will bear the consequence of a shorter retention require–ment. In that paragraph, however, I would delete the phrase "true and correct." The two words in that phrase are redundant. Do we really mean "accurate?" I would also delete the phrase ". . . made by written or electronic media." I do not perceive that any communications in 7.0(a) are neither written nor electronic. The phrase is, to me, surplusage. I also question the meaning of the phrase "factual or objective claim." If we mean that the advertiser must give the State Bar evidence to support any statement of fact, why not say so? And if we are

going to have such a phrase, why not modify it by adding the word "material." If only material communications are going to be held false or misleading, providing evidence to support an immaterial statement of fact should not be required.

11. In 7.2(b)(4), first line, the last word is "professional." Why is that word needed? Are we impliedly thereby endorsing referral fee agreements with accountants, notaries, barbers, and medical doctors?

12. Responding to the question raised in your footnote 17, I prefer to keep the concepts of referral fees to lawyers and to non-lawyers in one place, rather than in several rules.

13. 7.2(c) seems out of place where it is located. Shouldn't it follow 7.2(a)? The concept contained in 7.2(b) is so distinct from the concepts contained in 7.2(a) and (c), that I think 7.2(b) should be a separate rule, and 7.2(a) and (c) should appear at the beginning of 7.1.

14. As suggested by my comments above, I think the definition of "solicitation" is not needed. I agree with the suggestion contained in your footnote 19.

15. If we are going to keep the approach in 7.3(a), I prefer leaving in the phrase "the communication is protected from abridgement by the Constitution . . . ." I think the prohibition against solicitation is overbroad, and leaving this phrase in permits a court on a given occasion to find that a solicitation was constitutionally permissible and not have to declare the entire prohibition constitutionally void in order to find the solicitation permissible. An example of the kind of overbreadth of which I am concerned is the following example of a perfectly innocent conversa–tion between a lawyer and a sophisticated business executive: "What do I have to do to have your corporation hire me to represent it?" This kind of conversation goes on daily, and I cannot see anything inherently improper in it.

16. I am concerned about the use of the word "intrusion" in 7.3(b)(2). To me, every uninvited form of advertising is intrusive. Not all intrusions, however, are impermissible.

17. I agree with your recommendation in footnote 26.

18. I recommend that we adopt language similar to that of Montana as described in your footnote 28. I also agree with your recommendations in footnotes 29, 30, 31, and 32.

19. I disagree with the substance of 7.5(e). Although I acknowledge that the concept contained in that paragraph is a correct statement of current law, it seems to me that if a retired lawyer wants to assume the risk of potential vicarious liability for misconduct of his or her former partners, a retired lawyer ought to be able to allow his or her name to remain on the letterhead as "of

counsel" because of his or her traditional relationship with the former firm.

20. I suggest we consider Model Rule 7.6. The "pay to play" problem does not just arise in underwriting of public securities. Judges sometimes seem to reach out to find cases in which they can appoint a referee or special master as a payback to a political supporter. This is one of the bad aspects of contested judicial elections.

Please do not consider the foregoing be a criticism of your work. I am grateful for what you have accomplished, and these are merely suggestions.

With best regards and gratitude,

Jerry

May 5, 2004 Myles Berman E-mail to RRC List:

I am a criminal defense attorney practicing in Los Angeles with offices also in Orange and Ventura counties. I also have a substantial advertising budget covering radio, newspaper, Internet and direct mail. I also from time to time advertise in magazines, telephone books and on television. I have been following the revision process. Derek Danielson, of counsel to my office, has attended and participated in past sessions. I reviewed all the material for the 5/7 & 5/8 Commission meeting and am planning on attending on 5/7. The materials are very impressive and it looks like a tremendous amount of time and energy went into the drafting of the proposed rule changes. I do have 4 areas I would like to address re 1-400 on 5/7 and would like to at least address them here so as to avoid any surprises to this wonderful group of drafters.

1. Rule 7.2 (c) Including office addresses in print media consumes precious space. Listing of the firm's name and telephone number sufficiently identifies the advertising attorney.

2.Rule 7.3 (a) Adding language relating to protected speech per US and California Constitutions creates more problems due to impossibility to clarify the meaning of same. Sufficient existing case law would suffice. However, that case law is developing, is in a constant state of flux and varies from state to state.

3. Rule 7.3 (c) Adding "Advertising Material" at beginning and end of any of recorded or electronic transmission (television and radio) is redundant as these type of ads are self identifying and the public is well are they are ads. It also takes up precious time.

4. Generally, the prohibition of the use of Judge Pro Tem or similar language should be address in these rules as well as the Judicial Canon of Ethics. This issue may have been addressed here but I did not see it.

With the upmost respect and appreciation,

Myles L. Berman

05/05/04 Tuft Memo to RRC:

Rule 7.0 Definitions

1. A separate rule on definitions is not necessary. An explanation of the terms used can appear in the comments or discussion section to the rule where appropriate.

2. "Member" should be changed to "lawyer" here and throughout the rules, particularly in view of the recent adoption of California Rules of Court 964 – 967. Continued use of the term "member" is confusing. For example, use of the term "member" in relation to "lawyers" in subdivision (a)(2) and "attorney" in subdivision (b) will confound the reader.

3. I question whether a domain name in Rule 7.0(a)(1) is a professional designation of a member or law firm.

4. I agree with Jerry Sapiro's concerns regarding the phrase "computer network" in Rule 7.0(b) and (d).

5. We do not need a separate definition for "solicitation." The term "solicitation" is a hoary term that no longer has a common meaning that it once had. Rule 7.3 adequately defines the circumstances in which direct contact with a prospective client is prohibited.

6. Including "real time electronic contact" as a prohibited solicitation is not necessary limited to "chat" rooms.

7. Rule 7.0(D) should be 7.0(d).

8. Rather than recommend in our final report that Business & Professions Code §6157 be amended, the report should recommend that §6157 et seq. be remove from the State Bar Act.

Rule 7.1 Communications Concerning A Member's Services

1. We should stay with the ABA format.

2. While the format change in Rule 7.1(b) provides better clarity, if we are going to maintain provisions from current Rule 1-400(D), it is important to include Rule 1-400(D)(4) and (5). A glaring omission, in my opinion, from the Model Rule on communications and advertising is the absence of a prohibition of a communication that is transmitted in a manner that is overly intrusive as well as false and misleading. That concept should be retained in the rule. The following is a suggested way to accomplish this:

"(a) A lawyer shall not make a communication about the lawyer or the lawyer's services that:

(1) Contains any untrue statement; or

(2) Contains any matter, or presents or arranges any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or

(3) Omits to state any fact necessary to make the statements made in the light of the circumstances under which they are made; not misleading to the public; or

(4) Fails to indicate clearly, expressly, or by context, that it is a communication about the lawyer or the lawyer's services; or

(5) Is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct."

3. Adding the modifier "material" to untrue statement is a significant change and could present enforcement difficulties.

4. Rule 7.1(b)(2) – "present or arrange" should read "presents or arranges."

5. Rule 7.1(c) – end the first sentence with "rule" and delete "1-400."

6. I think we should defer discussion on the utility of the standards until the rules and the discussion have been determined.

7. We should delete the recordkeeping requirement under Rule 7.0(d) for the reasons that Ethics 2000 recommended in its revisions to the rules (see KEM's note 12).

Rule 7.2 Advertising

1. Rule 7.2(a) is clear and does not need a separate definition for "advertising" or "advertisement."

2. I agree that the concepts in current Rule 1-320(C) should be covered in Rule 7.2(b) and not in a separate rule.

3. As Kevin noted, Rule 7.2(b)(4) was added in 2002 to deal with "strategic alliances" and other forms of association and affiliations among lawyers and non-lawyer professionals. This provision is consistent with the current draft of Rule 1-310X and should be included in the rule.

4. A significant difference between the ABA Model Rules and the California Rules is that California permits "zfor-profit" lawyer referral services. Therefore, "not-for-profit" should be deleted in (b)(2). Also, "legal services"

should be inserted before the word “plan.”

5. I agree with KEM’s recommendation to move Rule 1-320(B) and 2-200(B) to this rule and to use the ABA language.

6. Rule 7.2(c) is preferable to current Standard 12, because as it permits the name and office address of a law firm as well as a member responsible for the content of a communication made pursuant to this rule.

Rule 7.3 Direct Contact with Prospective Clients

1. The rule as drafted eliminates the need for a separate definition of “solicitation.” Any further explanation can be made in the discussion to the rule.

2. I agree with KEM’s recommendation to not include in Rule 7.3(a) the additional language taken from current Rule 1-400(C).

3. I believe that the concept of “real time electronic contact” extends to more than a “chat room.” With changing technology, “real time” communications may become more the rule than the exception. I have concerns on First Amendment grounds about including real time electronic contact as a prohibited form of communication in an era of “virtual” law practice. If the Commission decides to include this provision in the rule, we should draw specific attention to it and solicit comments from the public and the Bar whether the prohibition should be included in the final version of the rule.

4. Rule 7.3(b)(2) represents a short coming in the ABA model rules. Communications that involve intrusion, coercion, intimidation, etc. cover more than in-person contacts. The concept in Rule 1-400(D)(5) should be maintained in our rules. As discussed above, this should be included in Rule 7.1.

5. The concept in current Rule 1-400(B)(2)(b) should also be included in Rule 7.3(b).

Rule 7.5 Firm Names and Letterhead

1. I am concerned about including Rule 7.5(e) as a rule rather than as a presumption. The term “of counsel” has many different applications and is only false and misleading if the lawyer making the communication fails to disclose the true nature of the relationship. All “of counsel” relationships are not necessarily close, personal, continuous or regular. ABA formal opinion 90-359 discusses this issue.

May 5, 2004 Balin E-mail to RRC List:

To the RRC:

With respect to Mr. Berman's comment regarding rule 7.2 (print advertising must carry office address), I support the proposal and disagree with Mr. Berman's comment. There are certain members of the criminal defense bar (and others) who place ads in numerous counties surrounding the city where they have ONE office. Each ad displays a LOCAL phone number and NO ADDRESS. These ads make it seem as though the attorney is a local attorney. When a prospective client calls the office to seek representation, the attorney sends out a "business manager" who signs up the client AT THE CLIENT'S HOME OR OFFICE, thus leading the client to believe that the lawyer is a local lawyer when that is not the case. I think that such advertising is misleading at best and downright fraudulent at worst.

By the way, I, too, am a criminal defense attorney and have been for most of my 30 years as a lawyer.

Sincerely,

William M. Balin